Supreme Court, U.S.
FILED
DEC 10 1998
CLERK

No. 98-778

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

IN RE: HERMAN WEST, Jr.,

Petitioner,

vs.

CITY OF GULFPORT, MISSISSIPPI, *et al.*,

Respondents.

ON PETITION FOR WRIT OF MANDAMUS
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

In addition to the parties named in the Petition, the following are additional parties to the proceeding:

Fifth Circuit Court of Appeals Judges Dennis, Jolly, Smith, and Weiner

Fifth Circuit Clerk of Court Honorable Charles R. Fulbridge, III

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JURISDICTION

These Respondents object to Petitioner's invocation of 28 U.S.C. § 1254(1) as the jurisdictional basis of his Petition. Respondents would show that, if the Court has jurisdiction, it would lie under 28 U.S.C. § 1651. Respondents would specifically object to Petitioner's failure to join all appropriate Respondents to this Petition and to give proper notice to those Respondents pursuant to Rule 29(4) of the Rules of the Supreme Court of the United States. Respondents further object to the instant Petition as untimely and moot.

STATUTES AND RULES INVOLVED

Respondents object to Petitioner's assertion that 28 U.S.C.A. § 2107 is involved in this matter. That Section controls the time for filing a **Notice** of Appeal as follows:

> § 2107 Time for Appeal to Court of Appeals
>
> (a) Except as otherwise provided in this Section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless **Notice of Appeal** is filed, within thirty days after the entry of such judgment, order or decree.
>
> * * *

There was no dispute in the underlying action with regard to the timeliness of the Notice of Appeal from the United States District Court.

Respondents would show that by virtue of Rules 27(b) and (c) of the Federal Rules of Appellate Procedure, the Clerk of Court and a single United States Circuit Court Judge are authorized to entertain procedural orders of the sort complained of by Petitioner. Rule 27 expressly provides:

* * *

> (b) Determination of Motions for Procedural Orders. Notwithstanding the provisions of (a) of this Rule 27 as to motions generally, motions for procedural orders, including any motion under Rule 26(b), may be acted upon at any time, without awaiting a response thereto, and pursuant to rule or order of the court, motions for specified types of procedural orders may be disposed of by the clerk. Any party adversely affected by such action may by application to the court request consideration, vacation or modification of such action.
>
> (c) Power of a single Judge to Entertain Motions. In addition to the authority expressly conferred by these rules or by law, a single judge of a court of appeals may entertain and may grant or deny any request for relief which under these rules may properly be sought by motion, except that a single judge may not dismiss or otherwise determine an appeal or other proceeding, and except that a court of appeals may provide by order or rule that any motion or class of motions must be acted upon by the court. The action of a single judge may be reviewed by the court.

* * *

Respondents emphatically deny that Rule 27 of the Federal Rules of Civil Procedure (pertaining to District Court Clerks) has any bearing on this issue surrounding the Clerk of the United States Court of Appeals. If anything, that Rule confirms that Petitioner had no right to rely on the Clerk for notification of any order.

Finally, Rule 20(1) of the Rules of the Supreme Court of the United States expressly provides:

> 1. Issuance by the Court of an extraordinary writ authorized by 28 U.S.C. § 1651(a) is not a matter of right, but of discretion sparingly exercised. To justify the granting of any such writ, the petition must show that the writ will be in aid of the Court's appellate jurisdiction, that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court.
>
> * * *
>
> 3. (a) A petition seeking a writ of prohibition, a writ of mandamus, or both in the alternative shall state the name and office or function of every person against whom relief is sought and shall set out with particularity why the relief sought is not available in any other court. A copy of the judgment with respect to which the writ is sought, including any related opinion, shall be appended to the petition together with any other document essential to understanding the petition.

> (b) The petition shall be served on every party to the proceeding with respect to which relief is sought. Within 30 days after the petition is placed on the docket, a party shall file 40 copies of any brief or briefs in opposition thereto, which shall comply fully with Rule 15. If a party named as a respondent does not wish to respond to the petition, that party may so advise the Clerk and all other parties by letter. All persons served are deemed respondents for all purposes in the proceedings in this Court.
>
> * * *

Petitioner has apparently requested the Court to issue the drastic remedy of mandamus against the Fifth Circuit Court of Appeals and the Clerk, but has failed to name either as a respondent in violation of Rule 20.

STATEMENT OF THE CASE

This cause of action was originally filed in the United States District Court for the Southern District of Mississippi, Southern Division, on June 14, 1996. The Complaint alleged Federal Question Jurisdiction pursuant to 28 U.S.C. § 1331. Thereafter, the Defendants (Respondents herein) filed a Motion for Summary Judgment and, after a full briefing, the District Court, Honorable Walter Gex, dismissed this claim by written opinion and final judgment entered with the Clerk of Court on January 13, 1998.

On February 2, 1998, the Petitioner filed a Notice of Appeal to the United States Court of Appeals for the Fifth Circuit. Upon

receipt of the record, the appeal was docketed on March 5, 1998, as evidenced by the Clerk's Notice, contained herein at Appendix A. Included prominently in the Notice is the Briefing Notice, requiring Plaintiff (Petitioner herein) to file his brief within forty (40) days from March 5, 1998, with the express admonition:

> *Dismissal of Appeals*. 5th Cir. R. 42.3 allows the clerk to dismiss appeals without notice if you do not timely file the brief.

Pursuant to Rule 31 of the Federal Rules of Appellate Procedure, the appellant's brief would have been due for filing with the Court on or before April 14, 1998.

The Petitioner did not file his brief or request for extension of time on or before April 14, 1998. On April 21, 1998, seven days after the due date, petitioner served a Motion for Leave to file brief out of time. That Motion requested an extension of thirty (30) additional days and recited as "good cause" that counsel was unaware that the deadline for filing the brief "was contained inside the record on appeal." Over objection of the Respondents, on June 4, 1998, the Court of Appeals, Honorable James L. Dennis, granted Petitioner's Motion for Leave to file the brief out of time until May 14, 1998 **(thirty days after the brief was originally due)**. See Order filed June 4, 1998, at Appendix B.

On June 8, 1998, after apparently reviewing the record and finding no brief filed by the Plaintiff-Appellant prior to expiration of the **thirty-day** extension (from April 14, 1998 to May 14, 1998), the Clerk of Court for the Fifth Circuit, by direction of the court, dismissed the instant appeal for want of prosecution due to the failure of Petitioner to file his brief within the time fixed by the Rules. See Judgment dated June 8, 1998, at Appendix C.

Thereafter, on June 19, 1998, some **66 days** after the initial due date and **36 days** after the requested and extended briefing deadline, Petitioner served a Motion to Reinstate Appeal and (for the first time) a document which purported to be an Appellant's brief. The purported brief contains three (3) pages of fact and two and one-half (2 ½) pages of argument.

On July 7, 1998, United States Circuit Judge Jerry L. Smith entered an Order denying Petitioner's Motion to Reinstate the Appeal, specifically finding that **"Appellant has had ample opportunity to comply with this Court's deadlines and extended deadlines."** See Order at Appendix D.

On July 13, 1998, Petitioner's counsel served a Motion for Reconsideration of the Appellate Court's July 7, 1998 Order, complaining that she was not apprised of the content of the Order Granting Leave to file the brief out of time until after the extension expired. After considering the motion and Respondents' objection, the Court of Appeals Three Judge Panel denied Petitioner's Motion for Reconsideration on August 5, 1998. See Order dated August 5, 1998, at Appendix E.

The dismissal of this appeal was fully reviewed by a three judge panel at the Fifth Circuit and those judges found no validity in Petitioner's argument of excusable neglect. The Court ruled by Order, without opinion, apparently agreeing with Respondents' argument that Petitioner's gross deviation from the rules was not excusable, or "excusable neglect". Thereafter, on November 3, 1998, Petitioner filed the instant Petition for Writ of Mandamus naming only the Defendants below as Respondents.

If the Court accepts this Petition and requires a full briefing, the Respondents will show that there is no justiciable issue whatsoever before this Court, that there was legal and factual

justification for the dismissal (with the Court having authority to exercise control over its docket in order to prevent disruption of the appellate process) and that by no means is there any dispute between the Circuit Courts of Appeals which has been identified, (or which exists) and has any application to the circumstances described in this Petition.

ARGUMENT

The Court's position on the availability of the drastic remedy of the Writ of Mandamus has been summarized as follows:

> The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations. *Will v. United States*, 389 U.S. 90, 95, 88 S. Ct. 269, 273, 19 L. Ed. 2d 305 (1967); *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 382-385, 74 S. Ct. 145, 147-149, 98 L.Ed. 106 (1953); *Ex parte Fahey*, 332 U.S. 258, 259, 67 S. Ct. 1558, 1559, 91 L. Ed. 2041 (1947). As we have observed, the writ "has traditionally been used in the federal courts only 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.' " *Will v. United States*, *supra*, 389 U.S. __, at 95, 88 S. Ct. __, at 273, quoting *Roche v. Evaporated Milk Assn.*, 319 U.S. 21, 26, 63 S. Ct. 938, 941, 87 L. Ed. 1185 (1943). And, while we have not limited the use of mandamus by an unduly narrow and technical understanding of what constitutes a matter of "jurisdiction," *Will v. United States*, *supra*, 389 U.S. __, at 95, 88 S. Ct. __, at 273, the fact still remains that "only exceptional circumstances amounting to a judicial 'usurpation of power' will

> justify the invocation of this extraordinary remedy." *Ibid.*
>
> Our treatment of mandamus within the federal court system as an extraordinary remedy is not without good reason. As we have recognized before, mandamus actions such as the one involved in the instant case "have the unfortunate consequence of making the (district court) judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants (appearing) before him" in the underlying case. *Bankers Life & Cas. Co. v. Holland, supra*, 346 U.S. __, at 384-385, 74 S. Ct., at 149, [426 U.S. 403] quoting *Ex parte Fahey, supra*, 332 U.S __, at 260, 67 S. Ct., at 1559.

Kerr v. U.S. District Court for Northern Dist. of California, 96 S. Ct. 2119, 2123, 426 U.S. 394, 402 (U.S. Cal. 1976).

Pursuant to Rule 20(1) of the Rules of the Supreme Court of the United States,

> [t]o justify the granting of any such writ, the petition must show that the writ will be in aid of the Court's appellate jurisdiction, that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court.

The party seeking issuance of the writ must show that his right to issuance of the writ is "clear and indisputable". *Banker's Life & Cas. Co. v. Holland*, 346 U.S. __, at 384, 74 S. Ct. at 148, quoting *United States ex rel. Bernardin v. Duell*, 172 U.S. 576, 582, 19 S. Ct. 286, 287, 43 L. Ed. 559 (1899); *Will v. United States, supra*, 389 U.S. __ at 96, 88 S. Ct. __ at 274.

Rule 31(a) of the Rules of Appellate Procedure mandates the time for filing of briefs by the Appellants. Rule 31(a) is clear and has been held to be unambiguous. *See In Re: Young*, 91 F.3d 1367, 1377 (10th Cir. 1996). Petitioner failed to file a timely brief, then after the time had long expired, filed a Motion for Leave to file the brief out of time. Petitioner then failed to file a brief within the extended period of time requested (and ultimately granted). The failure to file a timely appellate brief is, appropriately, grounds for dismissing an appeal. *See Stotler and Co. v. Able*, 837 F.2d 1425 (7th Cir. 1988) (holding that the failure to file a timely brief is inexcusable and that "orders fixing the schedule for briefing an appeal must be obeyed if the business of the federal courts is to be conducted with appropriate dispatch. . . ."); *United States v. Sosa*, 55 F.3d 278, 279 (7th Cir. 1995). The failure to file a timely brief hinders the Appellate court's ability to render speedy and just dispositions of all appeals for every litigant. *Matute v. Procoast Nav. Ltd.*, 928 F.2d 627, 631 (3rd Cir. 1991). Failing to file timely briefs disrupts the appellate process and should not be tolerated. *See Guam Sasaki Corp. v. Diana's Inc.*, 881 F.2d 713, 718 (9th Cir. 1989) (holding that dismissal was appropriate where the Appellant's failure to file timely papers "left the appeal to stagnate for a period of over twice that which was allowed by the normal process. . . .").

The Fifth Circuit has discretion to determine that an appeal has been abandoned based on a failure to file a timely brief. *Louisiana World Exposition v. Logue*, 746 F.2d 1033 (5th Cir. 1984) (citing, *Tidwell v. Dees*, 464 F.2d 1297 (5th Cir. 1972). The remedy for such an abandonment in appropriate cases is the dismissal of the appeal. An appeal should be dismissed, unless the party filing the untimely brief shows "extraordinary and compelling circumstances" which give the Court cause to excuse the violation. *Matute*, 928 F.2d at 631 (concluding that counsel's personal circumstances, including serious injury to

his son and the hospitalization of his son and wife during the 40 day briefing period warranted cause to excuse a briefing violation). The Court should not find cause to excuse a violation "unless the movant avers something more than the normal (or even the reasonably anticipated but abnormal) vicissitudes inherent in the practice of law." *United States v. Raimondi*, 760 F.2d 460, 462 (1985) (referring to the court's heightened scrutiny of untimely filed motions for extension of time). Respondents would respectfully submit that there is nothing extraordinary or compelling about Petitioner counsel's assertion that she did not read the briefing schedule sent to her by the Fifth Circuit (which she admittedly received).

Petitioner's counsel would have the Court believe that there is some dispute among the Federal Circuits in the application of "excusable neglect" for procedural errors by counsel. Since the Court's determination in *Pioneer Investment Services Co. v. Brunswick Associates Ltd.*, 507 U.S. 380, 390, 123 L. Ed. 2d 74, 113 S. Ct. 1489 (1993), (describing the factors used to determine "excusable neglect" and noting that inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute "excusable neglect") there has been no dispute about that terminology. The Fifth Circuit Court of Appeals adopted the *Pioneer* analysis in *Halicki v. Louisiana Casino Cruises, Inc.*, 151 F.3d 465 (5th Cir. 1998) (holding that a misinterpretation of appellate Rule 4 was not "excusable neglect").

The cases cited by Petitioner's counsel in her argument add nothing to this analysis. *Dyer v. McDougal*, 109 F. Supp. 444 (E.D.N.Y. 1952) is a very old District Court decision surrounding a request of extension of time to file a notice of appeal. The case has no application to the issue of any controversy between the Federal Appellate Circuits surrounding the application of Rule 31(a) of the Federal Rules of Appellate

Procedure. Similarly, the case of *United States v. San Geronimo Development Co.*, 154 F.2d 78 (1st Cir. 1946) (holding that a judgment must be entered before the time for appeal beings to run) has no application whatsoever. Counsel's invocation of Rule 58 of the Federal Rules of Civil Procedure for the proposition that the Clerk (District Court) is required to *enter* judgments adds nothing to this Petition.

In this instance, the Clerk for the Court of Appeals fairly warned Petitioner of the consequences of failing to file a timely brief and the Court leniently granted a thirty (30) day extension allowing Petitioner to file *after* the deadline had run. For some inexcusable reason, Petitioner's counsel failed to file any brief within the time period which she requested. As should have been expected, the Appeal was dismissed.

Petitioner's counsel has shown no reason why the Court accepting this Petition for Writ of Mandamus would aid in appellate jurisdiction, that exceptional circumstances exist, or that she has no adequate avenue of relief in other forums. Respondents respectfully submit that Petitioner's counsel's failure to file a timely appellate brief, despite the admonitions and generous extensions by the Court, does not rise to the level of "clear and indisputable" evidence that mandamus should issue.

CONCLUSION

For the reasons set forth herein, the Respondents would submit that Petitioner has not named all appropriate Respondents to this action. Further, Petitioner has not shown the sort of extraordinary situation warranting the drastic remedy of Writ of Mandamus. Therefore, the Petition for Writ of Mandamus should be denied.

Respectfully submitted,

WILLIAM E. WHITFIELD, III
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(228) 863-6101

APPENDIX

APPENDIX A — DOCKETING NOTICE OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED MARCH 5, 1998

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES R. FULBRUGE III
CLERK

TEL. 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA 70130

March 5, 1998

Ms La Quetta Maria Golden
Suite 206
2320 14th Street
Gulfport, MS 39501

No. 98-60061 West v. City of Gulfport
USDC No. 1:96-CV-370-G-R

We have docketed this case. Please use the case number above for future inquiry. We will send you a briefing checklist upon request. For your information, the briefing checklist is also on the Internet at the Fifth Circuit's Website "www.ca5.uscourts.gov."

Briefing Notice. Pursuant to Federal Rule of Appellate Procedure (FED. R. APP. P.) 12, we advise you that the record is complete for purposes of the appeal. Appellant's brief and record excerpts are due within 40 days of this date.

Appendix A

Policy on Extensions. The Court considers cases on the merits promptly after briefs are filed. However, the court will not know if the case requires oral argument until all briefs are filed. So, a delay in briefing is a delay in calendaring. The court has instructed us to grant extensions sparingly and only for good cause. As such, the ordinary busyness of counsel will not be considered grounds for an extension. You must also contact opposing counsel to determine if they oppose an extension.

Reply Brief. We will not forward cases to the court until all briefs are filed, except in criminal appeals. Therefore, you must file reply briefs within the 14 day period fixed by FED. R. APP. P. 31(a).

Brief Covers. We have attached the caption for this appeal. Please use this caption on any briefs to be filed with this court.

Dismissal of Appeals. 5TH CIR. R. 42.3 allows the clerk to dismiss appeals without notice if you do not timely file the brief.

Appearance Form. If you have not filed an appearance form you must do so, naming each party you represent, with 15 days from this date as required by FED. R. APP. P. 12(b) and 5TH CIR. R. 46.

We enclose the original record for your use in preparing your briefs and excerpts. Instructions are attached to the record defining your responsibilities for the handling and return.

Sincerely,

CHARLES R. FULBRUGE

By: s/ Larry M. Moore
Larry M. Moore, Deputy Clerk

Enclosure
cc w/encl: Mr. William E. Whitfield III

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED AND FILED JUNE 4, 1998

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-60061

HERMAN WEST, JR.

Plaintiff-Appellant

v.

CITY OF GULFPORT; KEN COMBS, in his individual and official capacity; GEORGE H. PAYNE, JR, in his individual and official capacity; STEPHEN BARNES, in his individual and official capacity

Defendants-Appellees

Appeal from the United States District Court for the Southern District of Mississippi, Biloxi

O R D E R:

IT IS ORDERED that appellant's motion to file appellant's brief out of time is granted.

IT IS FURTHER ORDERED that appellant's motion for an extension of time until May 14, 1998 to file appellant's brief is granted.

s/ James L. Dennis
JAMES L. DENNIS
UNITED STATES CIRCUIT JUDGE

APPENDIX C — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED AND FILED JUNE 8, 1998

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-60061

HERMAN WEST, JR.

Plaintiff-Appellant

v.

CITY OF GULFPORT; KEN COMBS, in his individual and official capacity; GEORGE H. PAYNE, JR, in his individual and official capacity; STEPHEN BARNES, in his individual and official capacity

Defendants-Appellees

Appeal from the United States District Court for the Southern District of Mississippi, Biloxi

CLERK'S OFFICE:

Under 5TH CIR. R. 42.3, the appeal is dismissed for want of prosecution for failure of appellant to file his brief, within the time fixed by the rules, this date, June 8, 1998.

CHARLES R. FULBRUGE III
Clerk of the United States Court
of Appeals for the Fifth Circuit

Appendix C

By: s/ Claudia Farrington
CLAUDIA FARRINGTON, Deputy Clerk

FOR THE COURT — BY DIRECTION

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING MOTION TO REINSTATE APPEAL DATED AND FILED JULY 7, 1998

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-60061

HERMAN WEST, JR.

Plaintiff-Appellant

v.

CITY OF GULFPORT; KEN COMBS, in his individual and official capacity; GEORGE H. PAYNE, JR, in his individual and official capacity; STEPHEN BARNES, in his individual and official capacity

Defendants-Appellees

Appeal from the United States District Court for the Southern District of Mississippi, Biloxi

Before JOLLY, SMITH and WEINER, Circuit Judges.

O R D E R:

IT IS ORDERED that motion of appellant to reinstate the appeal is DENIED. Appellant has had ample opportunity to comply with this court's deadlines and extended deadlines.

s/ Jerry E. Smith
JERRY E. SMITH
UNITED STATES CIRCUIT JUDGE

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING MOTION FOR RECONSIDERATION DATED AND FILED AUGUST 13, 1998

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-60061

HERMAN WEST, JR.

Plaintiff-Appellant

v.

CITY OF GULFPORT; KEN COMBS, in his individual and official capacity; GEORGE H. PAYNE, JR, in his individual and official capacity; STEPHEN BARNES, in his individual and official capacity

Defendants-Appellees

Appeal from the United States District Court for the Southern District of Mississippi, Biloxi

Before JOLLY, SMITH and WEINER, Circuit Judges.

BY THE COURT:

A member of this panel has previously denied appellant's motion to reinstate the appeal. After consideration by this panel upon request of appellant, IT IS ORDERED that appellant's motion for reconsideration is DENIED.